U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 16 May 2007

BALCA No.: **2007-INA-00001**
ETA No.: D-04282-14986

In the Matter of:

AIR LIQUIDE AMERICA CORPORATION,
Employer,

on behalf of

ARUL KEITH MATHIAS,
Alien.

Certifying Officer: Jenny Elser
Dallas Backlog Elimination Center

Appearances: Norman C. Plotkin, Esquire
Jackson & Hertogs
San Francisco, California
For the Employer

Before: **Chapman, Wood and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification in the above-captioned matter. Permanent alien labor certification is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations.[1] The CO denied the application and Employer requested review pursuant to 20 C.F.R. §656.26.

[1] This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code

STATEMENT OF THE CASE

On April 19, 1999, Employer, Air Liquide America Corporation, filed an application for alien employment certification on behalf of the Alien, Arul Keith Mathias, to fill the position of Production Engineer. (AF 85). The only requirement for the position stated on the ETA 750A was a Bachelor's degree in Chemical Engineering.

Employer received twenty seven applicant referrals in response to its recruitment efforts, all of whom were rejected as either unqualified or unavailable for the position. (AF 50-56).

A Notice of Findings (NOF) was issued by the CO on March 17, 2006, requesting documentation of lawful, job-related reasons for rejection of the U.S. workers who applied. (AF 31-34). The CO noted that thirteen applicants were rejected for lack of experience or exposure to certain areas of the job being offered yet Employer had not required any experience or established any other special requirements. Employer was instructed to document its efforts at contact of five applicants who Employer reported were rejected because they "never responded." Employer was instructed to document the lawful rejection of seven of the applicants referred who were not mentioned in Employer's recruitment report.

In Rebuttal, Employer contended that the thirteen applicants found not qualified to perform the job were not rejected for lack of unstated experience requirements, but rather because they either lacked appropriate coursework, failed to maintain current knowledge after completing the degree, or lacked any relevant experience after obtaining the degree that could have compensated for their coursework deficiencies and made them qualified. With respect to the five applicants Employer rejected because they "never

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of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised on Apr. 1, 2004), unless otherwise noted. We base our decision on the record upon which the CO denied certification and Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. §656.27(c).

responded," Employer stated that it had contacted each of these applicants as "quickly as possible" by telephone with follow-up e-mails, but that the telephone and e-mail records were no longer available for contacts in 2000 and 2001. Employer reported some specific times and dates for three of the applicants based upon "interview notes" but reported the others as "not preserved." In regards to the seven applicants not contacted by Employer, Employer stated they were not contacted owing to "a lack of familiarity with the local practices of the TWC at the time the recruitment was conducted" and asked that it be overlooked as "harmless error." (AF 15-23).

A Final Determination denying labor certification was issued by the CO on July 25, 2006, based upon a finding that Employer had failed to adequately document lawful, job-related rejection of U.S. worker applicants. (AF 4-6). In denying certification, the CO noted that Employer was provided with the addresses for the five applicants rejected because they "never responded" yet made no effort to contact them by mail. The CO similarly found Employer's rebuttal regarding the seven applicants not contacted lacking as there was no demonstration of a good faith recruitment effort towards these U.S. workers. On this basis, labor certification was denied.

Employer filed a Request for Reconsideration and Review by letter dated August 22, 2006. Employer's reconsideration request was denied on September 13, 2006, and the matter was referred to this Office and docketed on October 2, 2006. (AF 1-3).

DISCUSSION

Federal regulations at 20 C.F.R. § 656.21(b)(6) state that the employer is required to document that if U.S. workers have applied for a job opportunity offered to an alien, they may be rejected solely for lawful job related reasons. This regulation applies not only to an employer's formal rejection of an applicant, but also to a rejection which occurs because of actions taken by the employer. Section 656.20(c)(8) requires that the job opportunity be clearly open to any qualified U.S. worker.

Implicit in the regulations is a requirement of good faith recruitment. *H.C. LaMarche Ent. Inc.,* 1987-INA-607 (Oct. 27, 1988). Actions by the employer which indicate a lack of good faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are thus a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient United States workers who are "able, willing, qualified and available" to perform the work. 20 C.F.R. § 656.1.

In the instant case, the CO noted that five of the applicants were rejected because they "never responded" to Employer's attempts at contact and seven, because Employer made no effort to contact them. Employer was instructed to submit rebuttal documentation giving details of its attempt(s) to interview the U.S. applicants. Employer acknowledged that seven applicants were not contacted owing to a "lack of familiarity with local practices" and requested this be overlooked as "harmless error." Ignorance is not an excuse for failure to consider U.S. worker applicants for the petitioned position. Inasmuch as Employer has the burden of production and persuasion on the issue of lawful rejection of U.S. workers, *Cathay Carpet Mill, Inc.,* 1987-INA-161 (Dec. 7, 1988)(*en banc*), we conclude that labor certification was properly denied on this basis, given Employer's failure to document lawful rejection.

With respect to the five applicants Employer reported "never responded," Employer could not provide specific details regarding contact of two of the applicants and failed to submit supporting documentation of contact efforts such as telephone records. The Board in *M.N. Auto Electric Corp.,* 2000-INA-165 (Aug. 8, 2001)(*en banc*), *citing Gencorp,* 1987-INA-659 (Jan. 13, 1988)(*en banc*), noted that although a written assertion constitutes documentation that must be considered, a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof. To document initial or follow-up telephone conversations, the Board in *M.N. Auto Electric, supra,* instructed:

> An employer must, at a minimum, keep reasonably detailed notes on the conversation (e.g., when the call was made, how long it lasted, whether there was a successful contact with the applicant, the substance of the conversation. Pre-prepared checklists may be helpful in documenting what was discussed with the applicants). Where available, phone records showing the time and duration of the phone contacts should be submitted by Employer.

M.N. Auto Electric Corp., supra at 12 (footnote omitted). If an employer asserts that local phone records are not available, it should at a minimum be prepared to document that it asked the phone company for such records in a timely fashion. *Id.* Employer simply stated that telephone records were "no longer available" and that records of contact with some applicants were "not preserved."

Moreover, in this particular case, in light of the professional nature of the position, there is an even greater expectation that follow-up contact by mail would be appropriate when other means of contact have proved unsuccessful. At the time the applicants were referred, Employer was specifically advised in bold letters, all caps, that contact via certified mail return receipt was the suggested method of contact in order to ensure proof of good faith. (AF 56). Although a CO may not require use of certified mail, an employer who fails to do so runs the risk of not being able to prove its good faith efforts at contact and recruitment of U.S. workers. *M.N. Auto Electric Corp., supra.* Despite having the applicants' addresses readily available, Employer made no effort whatsoever at follow-up contact by mail. Presumably an Employer genuinely interested in filling a position would make every reasonable effort to contact these apparently qualified individuals.

As previously noted, it is Employer's burden of production and persuasion on the issue of lawful rejection of U.S. workers, *Cathay Carpet Mill, Inc.,* 1987-INA-161 (Dec. 7, 1988)(*en banc*). Employer has not met its burden to show that U.S. workers are not able, willing, qualified or available for this job opportunity, and accordingly, we conclude that labor certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED** and labor certification is **DENIED.**

Entered at the direction of the panel by:

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Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Certification Appeals
800 K Street, NW, Suite 400
Washington, D.C. 2001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.